

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

ELI LILLY AND COMPANY,	)	
Plaintiff,	)	
	)	
vs.	)	1:06-cv-1017-SEB-JMS
	)	
TEVA PHARMACEUTICALS USA, INC.,	)	
Defendant.	)	

**ENTRY ON MOTION TO COMPEL TEVA TO PRODUCE RALOXIFENE**

**IDENTIFIED IN ITS ANDA**

This matter is before the magistrate judge on Plaintiff Eli Lilly and Company's ("Lilly") Motion to Compel Teva to Produce Raloxifene Identified in its ANDA (Dkt. # 324). The motion is fully briefed, and being duly advised, the magistrate judge **GRANTS** the motion for the reasons set forth below.

Lilly has requested that Defendant Teva Pharmaceuticals USA, Inc. ("Teva") produce samples of tablets prepared with raloxifene from its biobatch and its commercial scale batches, as well as a limited quantity of blended granulated raloxifene from its commercial scale batches. Teva has refused, resulting in the instant motion. Teva argues that Lilly's discovery request and motion are untimely, and that the samples requested are not relevant to prove infringement.

Pursuant to Rule 37 of the Federal Rules of Civil Procedure, a party may file a motion to compel discovery when another party fails to respond to a discovery request or responds evasively or inadequately. The Court has broad discretion in resolving discovery disputes. *Meyer v. Southern Pacific Lines*, 199 F.R.D. 610, 611 (N.D.Ill. 2001); see also *Gile v. United Airlines, Inc.*, 95 F.3d 492, 495-496 (7<sup>th</sup> Cir. 1996) ("The district court exercises significant

discretion in ruling on a motion to compel.”). Under Rule 26(b)(1), “parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, . . .” *Fed. R. Civ. P. 26(b)(1)*.

Relevant information does not need to be admissible at trial so long as the discovery appears reasonably calculated to lead to the discovery of admissible evidence. *Chavez v. Daimler Chrysler Corp.*, 206 F.R.D. 615, 619 (S.D.Ind. 2002). For discovery purposes, relevancy is broadly construed to include “any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.” *TIG Ins. Co. V. Giffin, Winning, Cohen & Bodewes*, 2001 U.S. Dist. LEXIS 12995, 2001 WL 969037, \*1 (N.D.Ill. 2001), quoting *Oppenheimer Fund, Inc. V. Sanders*, 437 U.S. 340, 351, 57 L.Ed.2d 253, 98 S.Ct. 2380 (1978). The objecting party bears the burden of showing why a particular discovery request is improper. *Kodish v. Oakbrook Terrace Fire Protection District*, 235 F.R.D. 447, 449-450 (N.D.Ill. 2006).

As the discovery cutoff in this matter was August 11, 2008, Teva claims that Lilly’s request is untimely. Lilly asserts it could not have brought its motion any sooner, as Teva delayed in disclosing documents related to the change in its ANDA (which itself was just disclosed in mid-July), and produced documents from July through October. According to Lilly, the most recent discovery has revealed the fragility of Teva’s raloxifene product. Lilly argues that because of the implications of that fragility to the determination of infringement, Teva should be compelled to produce the requested samples. Teva counters that Lilly was aware of these issues well before the recent discovery.

Taking Teva’s last argument first, one of the documents Teva cites as evidence of Lilly’s prior knowledge was produced prior to the change to Teva’s product. The other was produced in

July while production of documents concerning the amended ANDA was ongoing. Indeed, Teva continued to produce documents regarding the change to its raloxifene product for over two months after the close of discovery. Lilly is entitled to review those documents and conduct whatever discovery may be necessary regarding the new information. Furthermore, in light of the new development, and the ongoing nature of document production regarding it, Lilly's request is not untimely.

Teva contends Lilly should have filed a motion to reopen discovery. However, such a motion was unnecessary given that the Court implicitly permitted additional discovery regarding the change in Teva's raloxifene product in its entry for the July 28, 2008 status conference (See Dkt. # 206). Despite Teva's assertion to the contrary, Lilly's sample request is encompassed by its previous discovery requests. Even if it were not, again, Lilly is entitled to conduct discovery on this new development.

As for Teva's argument that the samples requested are not relevant to prove infringement, Judge Barker's recent order concerning an extension of the statutory stay is instructive:

In light of the fact that Teva has recast its product more than eighteen months after it provided the original sample to Lilly and only eight months before trial is set to commence, we find that, in preparation for trial, Lilly is entitled to have a sufficient opportunity to identify the nature and composition of the raloxifene product as Teva intends for it to be sold.

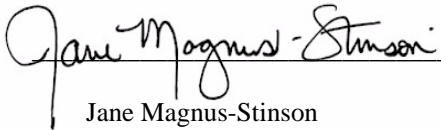
(Dkt. # 337 pg. 5). Lilly's sample requests are intended to accomplish precisely that: to identify the nature and composition of the raloxifene product as Teva intends for it to be sold. Further, Lilly previously proposed that Teva stipulate that the raloxifene sample produced to Lilly in December 2006 is the product Teva intends to sell and upon which infringement will be decided, and Teva declined. Moreover, in response to an interrogatory, Teva could not unequivocally

state that the December 2006 sample is representative of the product Teva intends to sell. (See Dkt. # 226, Ex. 8). As the magistrate judge commented at the September status conference, this matter will not be decided based on a hypothetical product. Therefore, Teva shall provide the samples requested.

For the foregoing reasons, Lilly's Motion to Compel Teva to Produce Raloxifene Identified in its ANDA is **GRANTED**. Teva shall provide the requested samples within ten calendar days of this order.

**SO ORDERED.**

12/05/2008

  
Jane Magnus-Stinson  
United States Magistrate Judge  
Southern District of Indiana

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